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Dear David,

This response was prepared by Citizens Advice. Citizens Advice has statutory responsibilities to represent the interests of energy consumers in Great Britain and welcomes the opportunity to respond to the consultation on the Energy Market Investigation (Database) Order.

The investigation has now finished, so we confine our comments to areas where the Order, the draft licence conditions, or the accompanying Explanatory Note could benefit from clarification, rather than a consideration of the merits of the intervention.

Ban on suppliers actively letting their customers they can opt-out

Our biggest single concern with the draft Order and Explanatory Note is the apparent ban on suppliers actively letting their customers know that they can opt-out of the database after the First Contact Communication ("FCC"). We recognise that your intention here appears to be to try and mitigate the risk of suppliers trying to game the remedy, but we think it brings a risk of material negative unintended consequences.

By definition, consumers will have not signed up to be on this database - it operates on an opt-out basis. Those who end up on it are also highly likely to be disengaged with, or disinterested in, supplier mailouts - as evidenced by the fact they have qualified to be on the database despite existing regulation requiring them to be sent annual statements pointing out they could save money if they shopped around. Most consumers will also be used to the

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processes that allow them to unsubscribe from distribution lists giving them multiple opportunities to do so - for example, the standard practice in email marketing of including opt-out/unsubscribe links in every piece of correspondence sent to a customer.

The Explanatory Note, in paragraph 73 in particular¹, suggests that the arrangements envisaged would go to significant lengths to preclude the possibility that consumers could find out how they could get off the database, even going as far as banning suppliers from providing such information on their websites, after the initial FCC.

The Order does not stipulate whether a FCC can or must be made by post or by email, with the definition of Writing/Written including both postal and email communications.

If email were used, the Order would appear to be in breach of several aspects of The Privacy and Electronic Communications (EC Directive) Regulations 2003 which requires both consumer consent to receive marketing information (eg it must be opt-in, not opt-out) and that they be given a simple means of unsubscribing in every communication.² Setting aside the merits or demerits of the proposal, we cannot see how what is proposed is compatible with these requirements if email is used as the written communication method.

While issuing both the FCC and subsequent unsolicited marketing by post instead may possibly get around this constraint, it appears to us to run against the spirit of such consumer protection laws. There is little evidence that consumers like receiving unsolicited mail, and the investigation brought forward no evidence (whether through trialling, past precedent or equivalent experience in other markets) to suggest that they will welcome this intervention. Indeed, there is much stronger evidence to suggest that

¹ "The Licence Conditions prohibit suppliers from initiating any communication with a Disengaged Customer about the database (including the process for opting out) following the First Contact Communication. This generally includes having a section on their website with an explanation of issues such as the background to the database, what data is being provided, how customers are selected, the nature of the service and how customers can opt out. Suppliers will also not be allowed to include any message in their communications with customers (eg bills and annual statements) about the database or the opt-out process (eg reminding them of the First Contact Communication)."

² <http://tinyurl.com/5wz8ho3>

consumers do not like receiving unsolicited marketing materials - services like the Telephone Preference Service ("TPS") and the Mailing Preference Service would not exist if they did.

We remain of the view that in its fundamental design, exposing consumers to potentially large swathes of unsolicited marketing materials is at least as likely to decrease consumer trust in, experience of, and engagement with, the energy sector as increase it. Making it purposefully difficult for consumers to get off the database only makes that situation worse.

Advice providers such as Citizens Advice may face higher costs as a result of dealing with larger volumes of consumer complaints and contacts if consumer experience of the market deteriorates. We will need to review our experience once this remedy is live. We may also be impacted by opt-out processes, which we discuss below.

Use (or prohibition) of third party agents in opting consumers out of the database with their permission

Both the Order and the Explanatory Note appear to be silent on whether third party agents could be used to opt a consumer out of the database with their permission. We think it is important that this is allowed for.

Such third party agents already exist in some areas of unsolicited marketing, most notably in the case of the TPS. Advice providers such as Citizens Advice may also be in a position where they are approached by consumers seeking information on how they get off the database. This could include signposting how that consumer can do this themselves, but it may be that doing this for them, with their permission, would be more helpful - for example, in the case of consumers who do not have access to the internet and cannot face calling their supplier. Equally, it may be that advice providers want to develop a tool or app that makes it easier for consumers to opt out, akin to the TPS.

It would be valuable if you could clarify that third party agents can opt consumers out of the database provided they have their permission to do so.

Key parameters of the remedy are yet to be defined

While the Order and its Explanatory Note envisages limits on how many customer communications can be sent using the database and on the time for which data can be used (its “best before” date), it is entirely silent on the parameters of both items.

If the number of allowable marketing mailouts to a customer is set for the whole market, not per supplier, there will need to be a process for suppliers to understand if that limit has been exhausted before they make contact with a customer. The detail of that process is currently absent.

Likewise, while it is envisaged that the remedy will need to cater for real-time opt outs of consumers from the database, it is silent on how this will work.

All of these areas require further consultation and definition so that stakeholders can understand how this remedy will work. Your statutory deadline for implementing remedial measures lapses on 23 December so in effect you are timed out from running that consultation. We would like to see you recommend to Ofgem that it consults in these areas.

Inadvertent capture of active customers

In the majority of cases, consumers who have been on standard variable tariffs for three years or more may be disengaged. But there may be cases where this is not true, particularly where new entrant suppliers have built business models around using Standard Variable Tariffs as an acquisition product, and do not offer fixed term products. The Order should allow for a derogation process whereby a supplier can request that Ofgem excludes its customers from the database where this is the case.

Agreement of the FCC wording

Section 4.4 of the Order requires that the wording of the FCC must be agreed by both the CMA and Ofgem.

This remedy is not subject to a sunset clause, and may be in place for many years. We note that Ofgem is planning to trial the remedy to see what works

and what does not. In combination, these factors suggest that there may be a need to revise the wording of the FCC on a number of future occasions.

Given this, we would suggest that rather than requiring both the CMA and Ofgem to agree the wording of the FCC, it would be more efficient if this role sat solely with Ofgem. This may allow for more efficient change management than requiring both bodies to mutually agree any future changes to it.

Citizens Advice access to database

Paragraph 63 of the Explanatory Note suggests that Ofgem may wish to give Citizens Advice access to the customer database.

We do not object to that inclusion, although we consider it highly unlikely we would seek to contact consumers without their permission, for the reasons given earlier in this response and in previous consultation responses. It is possible the database could provide us with some useful analytical data to understand consumer behaviour but we would need to see a much more detailed explanation of its design before we could reach a view on that matter. We will consider this matter further as the scheme design, and the results of Ofgem's trialling, becomes clearer.

We trust this submission is clear but please do not hesitate to get in contact if you would like to discuss any issue it raises in further detail.

Yours sincerely,

Richard Hall

Director of Strategic Infrastructure, Consumer Futures